Jurisdictional Statement

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL., APPELLANTS

v.

THOMAS P. SULLIVAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 18 U.S.C. (Supp. IV) 207(d) violates the equal protection component of the Due Process Clause of the Fifth Amendment because it imposes a broader conflict-of-interest restriction on former United States Attorneys who occupied positions classified in the Executive Schedule than it imposes on former United States Attorneys who occupied positions of relatively lesser rank.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-13a) is not reported.

JURISDICTION

The opinion and order of the district court holding an Act of Congress unconstitutional (App. A, *infra*, 1a-13a) were entered on January 7, 1982, and the notice of appeal to this Court (App. B, *infra*, 14a-15a) was filed on January 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 18 U.S.C. (Supp. IV) 207(c) and (d), as amended by Section 501(a) of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1864, and by Section 2 of the Act of June 22, 1979, Pub. L. No. 96-28, 93 Stat. 76, provide in pertinent part:

> (c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—
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> (1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
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> (2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and
>
> (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—
>
> shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d)(1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O-9 or above as described in section 201 of title 37, United States Code; or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay [grade] O-7 or O-8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and

> distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. * * *

STATEMENT

This case involves a constitutional challenge to the differing treatment of certain former United States Attorneys under a conflict-of-interest provision that limits the activities of former high-level Executive Branch officials in matters involving their former departments and agencies.

1. In the Ethics in Government Act of 1978,[1] Congress added a new subsection (c) to 18 U.S.C. 207, which contains the conflict-of-interest prohibitions applicable to persons who have left federal employment.[2] Subsection (c) bars a person who occupied a designated position, for one year after leaving government service, from representing anyone before or communicating with the department or agency in which he served—or any officer or employee thereof—in connection with any matter pending before or involving that department or agency. This prohibi-

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[1] Pub. L. No. 95-521, Section 501 (a), 92 Stat. 1864.

[2] Prior to its amendment in 1978, Section 207 contained two principal prohibitions. Subsection (a) permanently barred a former government employee, irrespective of his rank, from acting as agent or attorney before an agency or court in any case or other particular matter involving the United States if he had participated personally and substantially in the matter while in government service. Subsection (b) prohibited a former federal employee, for one year after leaving his position, from appearing in a matter that was under his official responsibility while in government service, even if he had not actually participated personally in the matter. These restrictions, as modified by the Ethics in Government Act, remain in effect and are not involved here.

tion applies even if the individual had no involvement in the matter while in government service and, indeed, even if the matter arose after he left office. The purpose of this restriction is to provide a "cooling off" period in order to prevent the appearance or reality of the misuse of special access, residual influence, or inside information by former officials in appearances before or communications with their former colleagues or subordinates. See, *e.g.*, S. Rep. No. 95-170, 95th Cong., 1st Sess. 31-34, 49, 152-154 (1977); H.R. Rep. No. 95-800, 95th Cong., 1st Sess. 18, 28, 32 (1977).

Congress determined, however, that the new restrictions in 18 U.S.C. 207(c)[3] should be limited to appearances or communications by former "high-ranking" officers and employees (H.R. Conf. Rep. No. 95-127, 95th Cong., 2d Sess. 75 (1978)), who in particular might have—or appear to the public to have—the special access to or residual influence with former colleagues and subordinates and the broadest inside information that could be subject to misuse. Congress did not conduct an individualized review of each position in the Executive Branch to determine whether it was sufficiently "high-ranking" to be covered by the new one-year cooling-off period. Instead, it provided for the coverage of former federal officials according to the rank of the positions they occupied, as independently established in the civil service laws.

First, Congress provided that all persons who occupied positions in the civil service category having the most responsibility and stature—those in Cabinet, sub-Cabinet, and other positions that are listed in the Executive Schedule (5 U.S.C. (Supp. IV) 5312-5316)—automatically would be covered by the

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[3] All references to Section 207 are to the amended version in Supp. IV to the 1976 edition of the Code.

one-year ban. See 18 U.S.C. 207(d)(1)(A). For positions in the categories just below the Executive Level—*i.e.*, those in the Senior Executive Service (SES) (5 U.S.C. (Supp. IV) 3131 *et seq.*) and others paid at or above the rate established for level GS-17 of the General Schedule (5 U.S.C. (Supp. IV) 5332)—Congress assigned to the Director of the Office of Government Ethics (OGE)[4] the responsibility for designating particular positions for coverage if he finds that they are vested with "significant decision-making or supervisory responsibility." 18 U.S.C. 207(d)(1)(C).[5] Finally, non-SES positions for which the basic rate of pay is less than that for level GS-17 of the General Schedule are not covered by the new one-year ban under any circumstances.

Former government officials who are automatically covered by 18 U.S.C. 207(c) by virtue of their having occupied an Executive Level position are barred for the one-year period from appearing before *any* component of the department or agency in which they served.[6] However, in the case of non-Executive Level

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[4] The Office of Government Ethics was established in the Office of Personnel Management by Title IV of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1862. See 5 U.S.C. (Supp. IV) App. 401 *et seq.*

[5] Congress followed a parallel approach with respect to commissioned officers in the uniformed services. See 18 U.S.C. 207(d)(1)(B) and (C). We shall confine the discussion in the text to civilian positions.

[6] A limited exception to this rule is contained in 18 U.S.C. 207(e), which permits the Director of OGE, in certain situations, to designate a statutorily created component within a larger department or agency as a separate department or agency for purposes of 18 U.S.C. 207(c). This exception has no application here, because the Director did not designate the U.S. Attorneys' Offices as separate statutory components under this provision.

positions designated for coverage administratively by the Director of OGE, the Director is given the further authority to narrow the breadth of the prohibition by permitting a former government employee who occupied such a position "in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency," if the Director determines that "there exists no potential for use of undue influence or unfair advantage based on past government service." 18 U.S.C. 207(d)(1)(C).

2.a. By virtue of 18 U.S.C. 207(d)(1)(A), all Executive Level positions in the Department of Justice are automatically covered by the new one-year restriction in 18 U.S.C. 207(c). See note 13, *infra*. These include the positions of United States Attorney for the four largest U.S. Attorneys' Offices—the Southern District of New York, the District of Columbia, the Northern District of Illinois, and the Central District of California. 5 U.S.C. (Supp. IV) 5315.

These four U.S. Attorney positions first were placed in the Executive Schedule by the President in 1964 (Exec. Order No. 11,189, 29 Fed. Reg. 15855)—the first two at Level IV and the latter two at Level V.[7] The President acted upon the recommendation of the Deputy Attorney General, who explained that these four "are by far the largest United States Attorneys' Offices in the country" and that the

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[7] The Executive Order refers to the U.S. Attorney for the Southern District of California. The judicial district for the Central District of California was established in 1966, and the U.S. Attorney for the Southern District became the U.S. Attorney for the Central District. Act of Mar. 18, 1966, Pub. L. No. 89-372, Section 3(e), 80 Stat. 76.

size and complexity of their caseloads "far exceed" those of other U.S. Attorney Offices. App. C, *infra*, 17a. The Deputy Attorney General further noted that these four offices long had been regarded as comparable in duties and responsibilities with the office of Assistant Attorney General, for which the salary was established by Congress at Level IV of the Executive Schedule. *Id.* at 17a-18a; see 5 U.S.C. (Supp. IV) 5315. In 1976, Congress elevated the positions of U.S. Attorney for the Northern District of Illinois and the Central District of California from Level V to Level IV of the Executive Schedule, in view of the increase in the size of their staffs and the volume of their work. Crime Control Act of 1976, Pub. L. No. 94-503, Section 202(b), 90 Stat. 2426; 122 Cong. Rec. 23808 (1976).

b. In addition to the Executive Level positions that are automatically covered by 18 U.S.C. 207(c), the Director of OGE, pursuant to 18 U.S.C. 207(d)(1)(C), designated for coverage in the Department of Justice a number of positions in the SES and GS grades 17 and 18. See 5 C.F.R. 737.33, at 465-467. Among those so designated are the 91 U.S. Attorney positions that are not listed in the Executive Schedule. *Id.* at 466.

The Director also exercised his authority under 18 U.S.C. 207(d)(1)(C) to permit certain persons who formerly served in one of the administratively designated positions—including the 91 non-Executive Level U.S. Attorney positions—to appear before or communicate with components of the Justice Department other than that in which they served. 5 C.F.R. 737.32, at 434; 737.13(d)(3). As a result of this designation, any former U.S. Attorney who occupied a non-Executive Level position is barred by 18 U.S.C. 207(c) from representing parties only in

dealings with the Office he formerly headed or the Office of the Attorney General or others in Washington directly responsible for supervising the work of his former Office. He therefore may, during the one-year period, appear before or communicate with any of the other U.S. Attorneys' Offices or with the various divisions of the Justice Department in Washington on pending matters, so long as he is not independently barred from doing so by 18 U.S.C. 207(a) and (b) because he had participated personally in or had official responsibility for the case while in government service. See note 2, *supra*.

3. On April 30, 1981, appellee ended a term as the U.S. Attorney for the Northern District of Illinois, one of the four Executive Level positions (App. A, *infra*, 1a). In July 1981, he filed this action in the United States District Court for the Northern District of Illinois challenging, on equal protection grounds, the constitutionality of the Department-wide prohibition imposed by 18 U.S.C. 207(c) and (d)(1)(A) on former Executive Level U.S. Attorneys, as compared with the narrower ban administratively fashioned for other former U.S. Attorneys. The complaint alleged that since returning to the private practice of law in Chicago in May 1981, appellee had, "on several occasions[,] been requested to [represent] clients and make personal appearances in matters with the Department of Justice in federal judicial districts outside the Northern District of Illinois" (Complaint, ¶ 8).

On January 7, 1982, the district court issued a memorandum opinion and order holding that 18 U.S.C. 207(c), as applied to the four Executive Level U.S. Attorneys, violates the equal protection component of the Due Process Clause of the Fifth Amend-

ment (App. A, *infra*, 8a-13a).[8] In the court's view, "[t]he government has offered no evidence sufficient to convince [the] court that the classification created by 18 U.S.C. §§ 207(c) and (d) and as applied to U.S. Attorneys bears a fair and substantial relation to the object of the Act" (App. A, *infra*, 12a).

The district court rejected the government's argument that the differing treatment was justified by the relative importance and prominence of appellee's former office and the other Executive Level U.S. Attorney positions, which accounted for their being placed in the Executive Schedule (App. A, *infra*, 11a-12a). The court stated that it could not "comprehend the rationale that sees a greater potential for conflict of interest to exist in the case of some former U.S. Attorneys but not for the many others" (*id.* at 12a). The

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[8] The district court rejected appellee's statutory argument that the U.S. Attorney's Office for the Northern District of Illinois, rather than the Department of Justice, should be regarded as the relevant "department or agency" for purposes of 18 U.S.C. 207(c). The court reasoned that the U.S. Attorneys' Offices are part of the Department of Justice and subject to the control of the Attorney General (see 28 U.S.C. 516 and 547; 28 C.F.R. 0.5 and 0.16) and that Congress had recognized the existence of separate offices within the departments to which 18 U.S.C. 207(c) refers by providing in 18 U.S.C. 207(d)(1)(C) for their separate designation in certain circumstances. App. A, *infra*, 4a-7a.

The court similarly rejected appellee's contention that he was not subject to a Department-wide ban as a result of the reference in 18 U.S.C. 207(d)(1)(A) to the Executive Schedule because his salary had been subject to various pay ceilings. See *United States* v. *Will*, 449 U.S. 200, 205-209 (1980). The court concluded that Congress intended to refer in 18 U.S.C. 207(d)(1)(A) to Executive Level *positions* and that automatic coverage of such positions under 18 U.S.C. 207(c) was not premised on their incumbents' receiving a particular salary. App. A, *infra*, 7a-8a.

court also noted that the other positions designated in the Executive Schedule have national authority and responsibility, as distinguished from what the court characterized as the "local" nature of a U.S. Attorney's jurisdiction (*id.* at 12a-13a). Accordingly, the court concluded that in imposing "two separate post-employment restrictions on U.S. Attorneys," Congress "created a classification which is arbitrary and unreasonable and bears no efficacious relationship to the legislative purpose underlying the Ethics in Government Act" (*id.* at 13a).[9]

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. That Act constitutes a carefully crafted and balanced effort by Congress to protect the integrity of agency decision-making from the real or apparent misuse of special access, residual influence, or inside information by former high-level government officials. Congress reasonably determined that a broader disqualification ordinarily would be required for former Executive Level officials, because in general they could be presumed to have broader access to and influence over decision-makers throughout the department or agency in which they served than would former officials of lesser rank. The narrower restriction for persons who occupied lower ranking positions also furthers the congressional pur-

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[9] Although the language of the district court's opinion is not precise, the court appears to have held that the four Executive Level U.S. Attorney positions cannot be covered automatically under 18 U.S.C. 207(d)(1)(A), but instead must be designated administratively by the Director of OGE pursuant to 18 U.S.C. 207(d)(1)(C) in the same manner as other U.S. Attorney positions. App. A, *infra*, 13a.

pose of ensuring that conflict-of-interest rules are not so restrictive that qualified persons are deterred from accepting government employment.

This Court has made clear that Congress may create classifications with the generality of cases in mind. The relevant classification here, consisting of all Executive Level positions, is not unconstitutional merely because it might have been thought by the district court to be overinclusive by the four Executive Level U.S. Attorney positions. In any event, the effect of the legislative line-drawing on U.S. Attorneys is rational because of the relative prominence and stature of the four Executive Level U.S. Attorneys as compared with the remaining 91. Thus, the decision of the district court is inconsistent with established equal protection doctrine and could invite judicial challenges to the scope of the one-year ban as applied to other Executive Level personnel. Review by this Court therefore is warranted.

1. The district court erred in focusing narrowly on whether it was rational for Congress to divide U.S. Attorneys into two groups. Congress did not enact provisions dealing specifically with U.S. Attorneys. Rather, Congress legislated generally in 18 U.S.C. 207(d)(1)(A) with respect to *all* Executive Level officials—a class that includes four U.S. Attorneys among the several hundred officials enumerated in 5 U.S.C. (Supp. IV) 5312-5316. Congress in turn distinguished this group from all other civilian employees of lesser rank referred to in 18 U.S.C. 207(d)(1)(C)—a class that includes the remaining 91 U.S. Attorneys among t' several thousand employees in the SES or paid at the rate of GS-17 or above.

This Court repeatedly has emphasized that legislation that does not employ suspect classifications or

impinge upon fundamental rights is entitled to a strong presumption of constitutionality and must be upheld against an equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981), slip op. 15; *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 175-178 (1980). Accordingly, a legislative classification must be found constitutional unless " 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational.' " *Hodel* v. *Indiana*, *supra*, slip op. 15-16, quoting *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). This standard plainly is satisfied here, for the same considerations that led Congress to limit the coverage of 18 U.S.C. 207(c) to former "high-ranking" officials justify Congress' further refinement of the prohibition by dividing the covered individuals into two subcategories according to the *relative* rank of the positions they formerly occupied.

a. Congress concluded when it enacted the Ethics in Government Act that former "high-ranking" officials (H.R. Conf. Rep. No. 95-1756, 95th Cong., 2d Sess. 74 (1978)) could be presumed to have—or would appear to the public to have—the greatest access to former colleagues and subordinates, the most residual influence over them, and the broadest inside information about the department's operations that might be subject to abuse. Accordingly, it tailored the application of the new one-year prohibition in 18 U.S.C. 207(c) to apply only to former high-ranking officials.

The Executive Schedule in 5 U.S.C. (Supp. IV) 5312-5316, lists the Cabinet, sub-Cabinet, and other officers who, in general, have the greatest stature and the most significant decision-making and supervisory responsibility in the Executive Branch. The SES and other employees referred to in 18 U.S.C. 207(d)(1)(C) in general hold positions of somewhat lesser stature and responsibility. It therefore was reasonable for Congress to conclude that, of all the persons covered by the new restrictions, the activities of former Executive Level personnel in appearances before the departments and agencies in which they served would present a relatively greater potential for the real or apparent abuses that 18 U.S.C. 207(c) was designed to prevent than would the activities of those who occupied the lower-ranking SES and GS-17 and GS-18 positions.

In particular, Congress reasonably could determine that although former Executive Level officials ordinarily would have a measure of special access, residual influence, and inside information throughout the department or agency in which they served, former officials of lesser rank might often have such access, influence, and inside information principally in the particular component in which they served. See 125 Cong. Rec. S7659-S7660 (daily ed. June 14, 1979); see also *id.* at H3690 (daily ed. May 24, 1979). Thus, the provision for the Director of OGE to tailor the scope of the one-year prohibition more narrowly in the case of persons in the latter category, upon a finding that there would be "no potential for use of undue influence or unfair advantage based on past government service," is directly responsive to the relatively lesser degree to which they present the potential for the abuses 18 U.S.C. 207(c) was intended to eliminate.

b. The narrower prohibition for former officials of relatively lesser rank also substantially furthers the competing congressional purpose of ensuring that conflict-of-interest rules are not so broad or restrictive that qualified persons are deterred from entering government service. S. Rep. No. 95-170, *supra*, at 32; H.R. Rep. No. 95-800, *supra*, at 18. Indeed, the provision in 18 U.S.C. 207(d)(1)(C) permitting the Director to fashion a less than department-wide prohibition for former non-Executive Level personnel was enacted specifically to meet this concern.

The present 18 U.S.C. 207(d)(1)(C) was not contained in the Ethics in Government Act as originally enacted in 1978. As a result, those persons covered by Section 207(c)—including all former U.S. Attorneys —would have been subject to a department-wide ban. As the July 1, 1979 effective date of the amendments approached,[10] Congress became concerned about reports that many federal employees were planning to leave government service as a result of the recently enacted conflict-of-interest provisions. There were proposals advanced in Congress to postpone the effective date of the new restrictions or to delete the new one-year prohibition in 18 U.S.C. 207(c) altogether. See generally H.R. Rep. No. 96-115, 96th Cong., 1st Sess. 3-5, 12 (1979); *id.* at 14 (views of Rep. Mazzoli); *id.* at 16-17 (views of Reps. Moorhead, *et al.*); 125 Cong. Rec. H3389-H3403 (daily ed. May 16, 1979); *id.* at H3685-H3687 (May 24, 1979); *id.* at H4596 (daily ed. June 15, 1979); *id.* at S7659-S7660 (daily ed. June 14, 1979). In response to these concerns, Congress enacted the present Section 207(d)(1)(C), in June 1979, both to limit the number

[10] See Section 503 of the Ethics in Government Act, 92 Stat. 1867.

of positions that may be designated for coverage [11] and to permit the Director to narrow the scope of the prohibition where appropriate. Act of June 22, 1979, Pub. L. No. 96-28, Section 2, 93 Stat. 76. Thus, the easing of the restrictions applicable to persons who occupied certain positions covered by the one-year prohibition reflects a careful and reasonable balancing of ethical concerns and the need to preserve the government's ability to attract and retain qualified employees in those positions.

Congress' granting of relief in these circumstances does not render the retention of a department-wide prohibition for former Executive Level officials irrational. "This court has made clear that a legislature need not 'strike at all evils at the same time or in the same way,' *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935), and that a legislature 'may implement [its] program step by step, * * * adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.' *New Orleans* v. *Dukes*, [427 U.S. 297, 303 (1976)]." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). Moreover, Congress reasonably could determine that similar relief was unnecessary for former Executive Level officials because a department-wide ban in general would be less likely to induce Executive Level personnel to leave federal service before the effective date of the Ethics in Government Act or to deter others from accepting such high-ranking and prestigious positions.[12]

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[11] As originally enacted, 18 U.S.C. 207(d) did not limit potential designations to positions in the SES or paid at a rate equal to or greater than that for GS-17 positions. See 92 Stat. 1865.

[12] It is significant in this regard that the department-wide restriction in 18 U.S.C. 207(c), as enacted in 1978, paralleled

2. The district court did not actually hold that Congress acted irrationally, as a general matter, in disinguishing former Executive Level officials from the class of other former employees designated for coverage administratively pursuant to 18 U.S.C. 207(d)(1)(C). Rather, the court concluded, in effect, that Congress acted irrationally in placing appellee and other former Executive Level U.S. Attorneys in the former category rather than the latter. But even if the classification of positions automatically subject to a department-wide ban under 18 U.S.C. 207(d)(1)(A) were "overinclusive" by these four positions, and "hence the line drawn by Congress [is] imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance* v. *Bradley*, *supra*, 440 U.S. at 108, quoting *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385 (1960). It is sufficient that, as we have shown, former Executive Level officials are in general more appropriately subject to a department-wide ban than are the covered individuals who occupied positions of lesser rank.

In any event, even if it were necessary to focus on the four Executive Level U.S. Attorney positions alone, their inclusion in the category of officials automatically subject to a Justice Department-wide ban is fully consistent with the congressional purposes underlying the creation of these two broad categories. Only six of the 55,000 officers and employees in the Department of Justice hold positions of higher rank

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a commitment President Carter obtained from his political appointees—principally Executive Level officials—even before passage of the Ethics in Government Act, apparently without any undue impact on recruiting. See H.R. Doc. No. 95-139, 95th Cong., 1st Sess. 1, 2 (1977).

than the four Executive Level U.S. Attorneys, and only 16 are of equal rank.[13] Moreover, the classification of these four positions under the Executive Schedule is the result of a specific presidential determination in 1964—and in the case of appellee's former office and that of the U.S. Attorney for the Central District of California, a similar congressional determination in 1976 (see page 8, *supra*)—that the positions have significant responsibilities equivalent to those of Assistant Attorneys General, who are classified at Level IV of the Executive Schedule and therefore subject to a Justice Department-wide ban under 18 U.S.C. 207(c).

Against this background, if Congress had focused specifically on U.S. Attorneys when it enacted 18 U.S.C. 207(d)(1)(C) in 1979, it could have concluded that the former U.S. Attorneys for the four largest districts—in view of the visibility of the offices they occupied, the frequency of their contacts with other parts of the Department, and the nature and size of their caseloads—would be relatively better known and might have, or be perceived by the public to have, greater influence over other U.S. Attorneys or Justice Department officials in Washington than would former U.S. Attorneys for smaller judicial

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[13] The six are the Attorney General, the Deputy and Associate Attorneys General, the Solicitor General, the Director of the FBI, and the Director of Justice Assistance, Research, and Statistics. 5 U.S.C. (Supp. IV) 5312-5314. The 16 are the 10 Assistant Attorneys General, the Associate Director of the FBI, the Commissioner of Immigration and Naturalization, the Director of the Bureau of Prisons, the Administrator of Law Enforcement Assistance, the Director of the National Institute of Justice, and the Director of the Bureau of Justice Statistics. 5 U.S.C. (Supp. IV) 5315.

districts.[14] At the very least, this could "reasonably be conceived [by Congress] to be true." *Vance* v. *Bradley*, *supra*, 440 U.S. at 111. By the same token, the four Executive Level U.S. Attorney positions could be thought to have sufficient stature, as compared with the other 91, that persons would be less likely to be deterred from accepting appointments to those positions because of the broader post-employment bar. For these reasons, Congress reasonably could determine that the four U.S. Attorneys at issue here have more in common with other Executive Level officials than with other U.S. Attorneys for purposes of this particular conflict of interest restriction. *Id.* at 109.

The district court relied in part on its conclusion that the U.S. Attorneys have "local" responsibilities while other officers listed in the Executive Schedule have "national" duties. App. A, *infra*, 12a-13a. However, although a U.S. Attorney has jurisdiction over cases only in one judicial district, the cases brought often have national significance and require coordination with Department officials in Washington and, occasionally, with other U.S. Attorneys' Offices. These

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[14] In the floor debates preceding passage of the Ethics in Government Act in 1978, Representative Danielson, the floor manager of the bill in the House, noted that four U.S. Attorneys occupied Executive Level positions and therefore would automatically be covered by 18 U.S.C. 207(c). He explained that the similarity of the duties of the other 91 U.S. Attorneys could lead to their administrative designation under the statutory standards then in the bill. 124 Cong. Rec. 30414 (1978). However, the provision in 18 U.S.C. 207(d)(1)(C) for limiting the scope of the prohibition was not contained in the 1978 Act, and Representative Danielson therefore had no occasion to consider the different treatment of the Executive Level U.S. Attorneys in this respect.

factors render the positions less distinctly local in nature than the district court appeared to believe. Moreover, the vast majority of positions for which a narrower restriction may be fashioned by the Director pursuant to 18 U.S.C. 207(d)(1)(C) also are not confined in their responsibilities to a particular locality. Thus, the supposedly "national" or "local" nature of a given position does not logically place it in one category or another. Accordingly, Congress rationally could conclude that former employees should be classified for purposes of 18 U.S.C. 207(c) according to the rank of their former positions, without regard to the geographic scope of their responsibilities. Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 102 (1947).

3. The decision below directly affects only the four Executive Level U.S. Attorney positions. However, the reasoning of the district court could call into question the classification of other top-level positions for purposes of 18 U.S.C. 207(c) whenever a court fails to perceive a sufficient individualized justification for placing a particular position in one category rather than another. Such an approach substantially undermines Congress' ability to legislate, as it must, by broad categories, drawing distinctions with the generality of cases in mind. See *Schweiker* v. *Wilson*, *supra*, 450 U.S. at 230; *Vance* v. *Bradley*, *supra*, 440 U.S. at 109.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal of the judgment below.[15]

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM KANTER
MARGARET E. CLARK
Attorneys

MARCH 1982

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[15] The one-year period following appellee's termination of office will expire on April 30, 1982, and it appears that this case may become moot at that time.

Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 3810

THOMAS P. SULLIVAN, PLAINTIFF

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT OF THE UNITED STATES OF AMERICA, and DIRECTOR, OFFICE OF GOVERNMENT ETHICS OF THE UNITED STATES OF AMERICA, DEFENDANTS

MEMORANDUM OPINION AND ORDER

Plaintiff in this cause served as United States Attorney for the Northern District of Illinois for a term ending on April 30, 1981. He served as head of one of the four largest offices of United States Attorneys; the other three being the Southern District of New York, the Central District of California, and the District of Columbia. The heads of these offices are paid under Level IV of the Executive Schedule ("Level IV"), 5 U.S.C. § 5315 ("the executive level U.S. Attorneys"). The remaining United States Attorneys are not included under Level IV, but are paid a lower salary.

In 1978, Congress passed the Ethics in Government Act ("the Act"), Pub.L. No. 95-521, 92 Stat. 1864 (1978), as amended by Pub.L. No. 96-28, 93 Stat. 76 (1979), to regulate, *inter alia*, the activities of federal officials after they leave government service. One such provision, 18 U.S.C. § 207, imposes certain restrictions on the post-government employment of certain officials in relation to their former

department or agency. The plaintiff challenges the application and interpretation of subsections 207(c) and (d) which allegedly bar his appearance in matters opposed to the Department of Justice outside the Northern District of Illinois during the first year after he leaves office.

The first of the relevant provisions, subsection 207(c), provides that an employee who was employed as enumerated in subsection 207(d) "within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before . . . the department or agency in which he served as an officer or employee . . ." shall be subject to criminal penalties. This provision, therefore, restricts the post-government employment of those employees specified in subsection 207(d)(1). Only subsections 207(d)(1)(A) and (C) are relevant here.

Those persons employed "at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay . . . ." are automatically included in the post-employment restrictions contained in subsection 207(c). 18 U.S.C. § 207(d)(1)(A). While under subsection 207(d)(1)(C), only those persons "in a position which involves significant decision making or supervisory responsibility, as designated . . . by the Director of the Office of Government Ethics . . . ." must heed the restrictions imposed on post-government activities. *Id.* § 207(d)(1)(C). This provision further provides that only those positions not included in the other subsections may be designated in this one. *Id.* Moreover, the restrictions imposed by subsection 207(c) may be

limited as they affect the persons in positions of "significant decision making" (subsection 207(d)(1)(C)),

> to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before . . . an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service.

Id. § 207(d)(1)(C). Pursuant to this authority, the Office of Personnel Management and the Director of the Office of Government Ethics has designated the Office of United States Attorney for each judicial district as a separate bureau within the Department of Justice. 5 U.S.C. §§ 737.13 and 737.32 (1981). The United States Attorneys designated under this subsection are precluded, therefore, from practicing before the United States Attorney's Office in which they were employed for one year. Whereas, the persons in positions designated under subsection 207(d)(1)(A) are automatically restricted from practicing in proceedings involving the entire Department of Justice for one year after leaving the agency. The latter designation refers, *arguendo*, to the four executive level U.S. Attorneys whereas the former refers to the remaining 91 U.S. Attorneys.

The issue before the court, therefore, is, first, whether the plaintiff, as well as the other executive level U.S. Attorneys is subject to the one year ban in all matters opposed to the Department of Justice under 18 U.S.C. § 207(d)(1)(A). If the plaintiff

is subject to these restrictions, then the court must ascertain whether they are unconstitutional as applied to executive level U.S. Attorneys under the equal protection component of the due process clause of the Fifth Amendment to the Constitution. This cause presents no disputed factual matters. Instead, the parties seek disposition of the questions of law on cross-motions for summary judgment. Rule 56, Fed.R.Civ.P. The plaintiff offers three arguments in support of his motion. These will be addressed *seriatim.*

I.

The plaintiff's first argument is that the agency or department [1] referred to in subsection 207(c) is in actuality the United States Attorney's Office for the Northern District of Illinois and not the entire Department of Justice. Therefore, according to the plaintiff, subsection 207(c) does not bar the plaintiff from representing clients in matters involving other offices of U.S. Attorneys or the Department of Justice during the first year after plaintiff left office.

The plaintiff buttresses his argument with the following theory of statutory construction. He asserts that the offices, *i.e.*, "agencies," organized within the ambit of the Department of Justice are explicitly stated as included by statute. He offers the Federal

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[1] The plaintiff subsequently limited the scope of this argument to the fact that the U.S. Attorney's Office in each judicial district is a separate "agency" within the meaning of subsection 207(c) and not a separate department. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment at 3-4. For this reason, the court will limit its analysis to this theory as well.

Bureau of Investigation as an example of an agency expressly included by statute as being under the domain of the Department of Justice, whereas the offices of U.S. Attorneys are not. *Compare* 28 U.S.C. § 531 and 28 U.S.C. § 541. By this reasoning, the plaintiff contends that whether he was covered by subsection 207(d)(1)(A) or subsection 207(d)(1)(C), he is able to participate in proceedings involving any U.S. Attorney's Office except the U.S. Attorney's Office for the Northern District of Illinois. However, this argument contraverts both the relevant statutory language and the intent of Congress.

The definition of the term "agency" as it is used throughout title 18 of the United States Code includes:

> any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context show[s] that such a term was intended to be used in a more limited sense.

18 U.S.C. § 6. The government contends that each U.S. Attorney's Office is an integral part of the Department of Justice. This is based upon an analysis of the statutory framework deliniating the organization and structure of the department. One example is the fact that "the conduct of litigation in which the United States is a party, or is interested . . . is reserved to officers of the Department of Justice under the direction of the Attorney General." 28 U.S.C. § 516. The U.S. Attorney's function is to conduct litigation on behalf of the United States. *See Id.* § 547. Therefore, he can only be serving as an officer of the Justice Department.

Moreover, responsibility for the appointment, compensation and removal of all Assistant U.S. Attorneys, the employment of all clerical assistants, allowance of all expenses and the location of a U.S. Attorney's Office is all given to the Attorney General as head of the Department of Justice. 28 U.S.C. §§ 542-50. *See, e.g.*, 28 C.F.R. §§ 0.5 and 0.16. This provides further evidence of the fact that each office of the U.S. Attorney belongs within Justice and cannot be treated as a separate agency.

Congress was aware of the fact that certain "offices" with distinct subject matter jurisdiction exist. It took special cognizance of this fact when it provided for exceptions to section 207(c) to reflect the existence of these separate offices. One such example is directly applicable here. In the 1979 amendments to section 207, Congress provided for the designation of separate "agencies" or "bureaus" within a "department or agency." 18 U.S.C. § 207 (d)(1)(C). This exception refers to offices "having separate and distinct subject matter jurisdiction," but which have not been so designated by statute. Each U.S. Attorney's Office has been designated as separate under this provision by OGE. 5 C.F.R. § 737.31-32 (1981). However, this designation was not intended to apply to U.S. Attorneys who occupied executive level positions. 18 U.S.C. § 207(d)(1)(C).[2]

Clearly Congress was acquainted with the fact that "separate" offices exist within statutory agen-

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[2] The OGE issued a directive in which it noted that positions automatically designated by subsection 207(d)(1)(A) cannot be included under subsection 207(d)(1)(C). That is, all executive level U.S. Attorneys designated under subsection 207(d)(1)(A) cannot be considered for inclusion under the exceptions provided for under subsection 207(d)(1)(C). 45 *Fed. Reg.* 8545, 8556 (Feb. 8, 1980).

cies. It chose not to treat each office of U.S. Attorney as such an entity. Having analyzed the statutory scheme of the Department of Justice, this court concludes that the Office of U.S. Attorney is an integral part of that department.

II.

The classes of government officials subject to subsection 207(c) restrictions are listed in subsection 207(d)(1). As provided by subsection 207(d)(1)(A), the prohibitions of subsection 207(c) shall apply to those persons employed "at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5 . . . ." This section lists positions designated under the "Executive Schedule Pay Rates" and includes, in particular, the four United States Attorneys listed at Level IV of the Executive Schedule.

The plaintiff's second argument stems from the fact that, although his position was designated as Level IV of the Executive Schedule, he was never paid at that rate because an executive order limited salaries of persons in certain executive level positions, including those persons in Level IV positions. *See, e.g.*, Pub.L. No. 95-429, 92 Stat. 1017 (1978). The plaintiff maintains, therefore, that he cannot be subject to the limitations imposed by subsection 207(d)(1)(A) on those persons in executive level positions. The court does not agree with this argument.

The reference made by Congress to executive level positions covered by subsection 207(d)(1)(A) indicates merely the *positions* to which subsection 207(c) should apply. The specific reference was not premised on the fact that those in positions so designated were to receive a higher salary nor was it condi-

tioned on whether those persons actually received a particular salary. The designation according to pay grade was simply to facilitate denoting those "high level officials" to whom subsection 207(c) would apply. The designation has nothing whatsoever to do with whether these executive level officials received their "full" salaries or whether they were subject to executive orders restricting their gross salaries. *See* Pub.L. No. 95-429, 92 Stat. 1017 (Oct. 10, 1978). It is clear, therefore, that plaintiff was paid a salary "fixed according to" the executive schedule. The fact that he did not receive the full amount appropriated under this schedule fails to persuade this court that he is not subject to the restrictions imposed by subsection 207(c) and subsection 207(d)(1)(A). However, this court must next determine whether this designation passes constitutional muster.

III.

This court has already determined that subsection 207(c) as made applicable by subsection 207(d)(1)(A) prevents the plaintiff, as well as the other executive level U.S. Attorneys from involving themselves in any matters opposed by the Department of Justice for a period of one year. The plaintiff's third and final argument is that the prohibitions imposed on the four executive level U.S. Attorneys constitutes an arbitrary classification so as to contravene the equal protection "component" of the due process clause of the Fifth Amendment to the Constitution. According to the plaintiff, the classification scheme of section 207(d), which treats executive level U.S. Attorneys differently from non-executive level U.S. Attorneys and which determines the coverage of subsection 207(c), is not rationally based.

The federal government is prohibited under the due process clause of the Fifth Amendment from engaging in discrimination that is "so unjustifiable as to be violative of due process." *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Equal protection claims made under the Fifth Amendment must be approached in exactly the same manner in which they are handled under the Fourteenth Amendment. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The appropriate standard is a strict one. The court may not overturn a properly enacted statute on equal protection grounds unless "the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 193 (1979).

According to the plaintiff, the distinctions created by subsection 207(d) are irrational and unnecessary. He contends that the major difference between the four executive level U.S. Attorneys and 91 others is their salary. While in office, they all share the same duties and powers and are subject to the same restrictions. Except for the different rates of pay, all U.S. Attorney positions are identical save for the fact that the 91 non-executive level U.S. Attorneys covered by subsection 207(d)(1)(C) are precluded only from representing persons before the particular office or judicial district with which they were associated. The executive level U.S. Attorneys merely received additional compensation for an increased workload. *See, e.g.*, Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, Exh. A.

Next, the plaintiff compares the positions affected by subsection 207(d)(1)(A). All the offices are national in scope except for the four U.S. Attorneys. *See* 5 U.S.C. §§ 5312-316. This, the plaintiff maintains, is a consequence of the overinclusiveness of section 207(d)(1)(A). Finally, it is argued that this statutory scheme is totally unrelated to the legislative purpose underlying the Ethics in Government Act of 1978 and its amendments, Pub.L. No. 95-521, 92 Stat. 1864 (1978) and Pub.L. No. 96-28, 93 Stat. 76 (1979) (collectively referred to as the "Act").

Having reviewed the applicable legislative history characterizing the promulgation of the Act, it is evident to this court that the Act's main purpose is to promote efficiency and integrity within the government. As this portion of the legislative history indicates:

> The restrictions [created by the Act] are imposed to insure government efficiency, eliminate official corruption, and promote even-handed exercise of administrative discretion. Former officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies; they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients . . . .
>
> 18 U.S.C. 207, like other conflict of interest statutes, seeks to avoid even the appearance of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true . . . .

> There is a deep public uneasiness with officials who switch sides—who become advocates for and advisors to the outside interests they previously supervised as government employees. After all there are reasons why private clients so frequently hire former officials, and the attraction explains why some of them do so well in subsequent careers in the private sector. Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. It is feared that officials may use information, influence, and access acquired during government service at public expense, for improper and unfair advantage in subsequent dealings with that department or agency.

S.Rep. No. 95-170, 95th Cong. 2d. Sess. 31-33, *reprinted in* [1978] U.S. Code Cong. & Adm. News 4247-249. While Congress recognized that even the appearance of impropriety was a situation to be avoided, it had to balance this interest against the desire to attract talented and qualified individuals to government service. *See* S.Rep. No. 95-170, 95th Cong. 2d Sess. 32, *reprinted in* [1978] U.S. Code Cong. & Adm. News 4248.

In 1979, Congress amended the Act to include subsection 207(d)(1)(C). Apparently, it did so largely in order to remedy overbroad applications of the restrictions imposed by subsection 207(c) and to reestablish a measure of balance and flexibiilty.

The government, in support of its contention that the challenged statutory scheme is not unconstitutional, claims that the distinction drawn between executive level and all other U.S. Attorneys is based

not just on different rates of pay but also on the "importance and prominence" of the executive level U.S. Attorneys' positions. It is this prominence, according to the government, which accounts for the executive level U.S. Attorneys being ranked on the Executive Schedule in the first place and, hence, subject to the restrictions of subsection 207(d)(1)(A).

This argument, as well as others tendered by the government, is insufficient justification for the statutory distinctions drawn by subsections 207(c) and (d). In order to withstand constitutional muster, the classifications created by the Act "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415 (1920).

The government has offered no evidence sufficient to convince this court that the classification created by 18 U.S.C. §§ 207(c) and (d) and as applied to U.S. Attorneys bears a fair and substantial relation to the object of the Act. The court bears in mind the fact that the purpose of the Act generally is the protection of the public and the enhancement of public confidence in the integrity of government. Conflict of interest, and even the appearance of conflict of interest for former government officials is to be precluded. The court cannot comprehend the rationale that sees a greater potential for conflict of interest to exist in the case of some former U.S. Attorneys but not for the many others. This is particularly true when all other Department of Justice positions affected by the more stringent provisions of section 207(d)(1)(A) are national in authority

and responsibility, as distinguished from the local nature of a United States Attorney's jurisdiction.

Congress, by virtue of imposing two separate post-employment restrictions on U.S. Attorneys, has created a classification which is arbitrary and unreasonable and bears no efficacious relationship to the legislative purpose underlying the Ethics in Government Act.

In conclusion, the court holds that section 207(d)(1)(A) as made applicable to the four executive level U.S. Attorneys by section 207(c) violates the equal protection component of the due process clause of the Fifth Amendment of the Constitution. The court hereby declares the statute unconstitutional as it applies to these four U.S. Attorneys. There are no issues of material fact; the plaintiff is entitled to judgment as a matter of law.

ENTER:

/s/ Frank J. McGarr
United States District Judge

Dated: January 7, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 3810

[Filed January 29, 1982]

Judge McGarr

THOMAS P. SULLIVAN, PLAINTIFF

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT OF THE UNITED STATES OF AMERICA, and DIRECTOR, OFFICE OF GOVERNMENT ETHICS OF THE UNITED STATES OF AMERICA, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §§ 1252 and 2101(a), the Defendants, Director, Office of Personnel Management of the United States of America, and Director, Office of Government Ethics of the United States of America, hereby appeal to the Supreme Court of the United States from the Judgment of this Court in the above-styled action entered on January 7, 1982.

Date: [January 29,] 1982.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

DAN K. WEBB
United States Attorney

ROBERT E. KOPP
Director, Appellate Staff
Department of Justice

/s/ Robert T. Grueneberg
ROBERT T. GRUENEBERG
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5355

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
Washington, D.C. 20530

August 11, 1964

Honorable Kermit Gordon
Director
Bureau of the Budget
Washington, D.C.

Dear Mr. Gordon:

The purpose of this letter is to bring to the attention of the President the recommendation of the Department of Justice that two positions of United States Attorney be placed by the President in salary level IV and two in level V of the Federal Executive Salary Schedule, established by sections 303(d) and (e) of the Federal Employees Salary Act of 1964. Level IV of the Schedule is fixed at the annual rate of $27,000 basic compensation and level V at $26,000. Section 303(g) of the Act authorizes the President to place in levels IV and V offices and positions the duties and responsibilities of which he deems appropriate for those levels. For the reasons detailed below, I believe that the offices of the United States Attorney for the Southern District of New York and the United States Attorney for the District of Columbia carry duties and responsibilities which are appropriate for level IV, and that the offices of the United States Attorney for the Northern District of Illinois and the Southern District of California should be placed in level V of the Schedule. These four offices, presently salaried at $20,000 per annum pursuant to 28 U.S.C. 508 have historically been in parity on salary with most of the offices placed in level IV by the 1964 Act.

Duties and Responsibilities

The offices of the United States Attorney for the Southern District of New York, the District of Columbia, the Northern District of Illinois and the Southern District of California are by far the largest United States Attorneys' offices in the country. The number of lawyers and clerks employed in these offices is as follows:

	Lawyers	Clerks
S. D. New York	68	92
District of Columbia	52	46
N. D. Illinois	33	39
S. D. California	25	28

The volume and complexity of the caseload of these offices far exceed the volume and complexity of the caseload of the other United States Attorneys' offices in the country. These offices are divided into several divisions, each headed by a division chief who is responsible to the First Assistant United States Attorney and to the United States Attorney. The supervision of each of these offices by the United States Attorney is a major, exceptionally demanding, and responsible task.

In addition, the United States Attorney for the District of Columbia, by reason of his local, as opposed to strictly federal, responsibilities, carries a considerable burden of legislative duties. These duties call for his preparation and recommendation of legislation and for his frequent appearance as a witness in hearings of Congressional committees, and add materially to the usual duties and responsibilities of a United States Attorney.

Parity with other Offices Placed in Levels IV and V

By reason of the foregoing characteristics, the subject offices have long been regarded as comparable

in duties and responsibilities with the office of Assistant Attorney General and, accordingly, the salary of the offices has been on a parity with the salary of Assistant Attorneys General. Prior to the effective date of the Federal Employees Salary Act of 1964, that salary was $2),000 per annum. Under subsection 303(d) of that Act, the salaries of Assistant Attorneys General are fixed at $27,000, or level IV of the Federal Executive Salary Schedule.

Most of the other offices placed in level IV or V by the Act have for many years carried the same or lower salaries than those of the United States Attorneys for the Southern District of New York, the District of Columbia, the Northern District of Illinois and the Southern District of California, i. e., $20,000 per annum.

We believe considerations of comparable duties and responsibilities, as well as considerations of fairness and historic parity, warrant the inclusion of these offices in the Federal Executive Salary Schedule. We recognize there is some difference in the size of the staffs and the caseload among the four offices, however, it is for this reason we recommend the placement of the offices of United States Attorney for the Southern District of New York and the District of Columbia in level IV, and the inclusion of the offices of United States Attorney for the Northern District of Illinois and the Southern District of New York [*sic*] in level V. I hope you will make this recommendation to the President and that he will take this well merited action.

I am aware of certain anomalous language in section 306 (a) of the Act, dealing with United States Attorneys and their assistants, which defers to the President's discretionary authority under subsection 303(f) of the Act, but does not mention his powers

under subsection 303(g). This is, of course, the result of an inadvertence, and it seems quite apparent that the provisions of section 306(a) were *not* intended to preclude the President's designation of two United States Attorneys in level IV under 303(g). This is clear because when 306(a) was first drafted and adopted in committee there was no subsection 303(g), and all of the President's discretionary power was in subsection (f). Under the earlier language of (f) the President clearly could have placed a United States Attorney in level IV. When the President's authority was then divided between subsections (f) and (g) of section 303, the Committee forgot to amend 306(a)(1) and (a)(2) to read "subject to sections 303(f) and (g)", and probably by a clerical oversight those provisions were allowed to stand reading "subject to section 303(f)." In my view, this inadvertence does not affect the intention and meaning of the Act, nor the clear and unqualified terms of section 303(g). The President's power under 303(g) is not limited by the terms of 306 (a)(1) and (2). Section 306(a) applies to the Attorney General's power to fix salaries, and obviously has no application, limiting or otherwise, to the President's power under section 303(g).

Sincerely yours,

/s/ Nicholas deB. Katzenbach
NICHOLAS DEB. KATZENBACH
Deputy Attorney General

cc: Hon. Bill D. Moyers
Hon. John W. Macy, Jr.

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Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
APR 30 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1787

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD J. DEVINE, DIRECTOR OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Defendants-Appellants,

v.

THOMAS P. SULLIVAN,

Plaintiff-Appellee.

On Appeal From The United States District Court
For The Northern District Of Illinois

MOTION TO AFFIRM OF APPELLEE, THOMAS P. SULLIVAN

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QUESTION PRESENTED

Whether section 207(d) of the Ethics in Government Act, 18 U.S.C. § 207(d), violates the Equal Protection component of the Due Process Clause of the Fifth Amendment because of the nationwide post-employment restriction placed on four former U.S. Attorneys, including Thomas P. Sullivan, which is not placed on other former U.S. Attorneys.

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In the Supreme Court of the United States

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No. 81-1787

DONALD J. DEVINE, DIRECTOR OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Defendants-Appellants,

v.

THOMAS P. SULLIVAN,

Plaintiff-Appellee

On Appeal From The United States District Court
For The Northern District Of Illinois

MOTION TO AFFIRM OF APPELLEE, THOMAS P. SULLIVAN

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee, Thomas P. Sullivan, moves this Court for entry of an order affirming the district court's judgment on the grounds that the district court correctly decided this matter with its complete and accurate analysis of the law, thereby leaving no questions which merit further argument.

STATEMENT OF THE CASE

Until April 30, 1981, Thomas P. Sullivan, served by Presidential appointment as the United States Attorney for the Northern District of Illinois. Mr. Sullivan left that position as of May 1, 1981, to return to the private practice of law.

Pursuant to the Ethics in Government Act, 18 U.S.C. § 207(c) and (d), Mr. Sullivan is subject to a one year, nationwide post-employment prohibition against his representation of clients in proceedings with the department or agency in which he served. Violations are punishable as criminal offenses. This one year, nationwide ban applies to all government officials paid according to the executive pay schedule. Included among these "executive level" positions are the U.S. Attorneys' offices from the following four judicial districts: Northern District of Illinois, Central District of California, District of Columbia and Southern District of New York. Other than these four United States Attorneys, all positions listed in the executive pay schedule are offices with nationwide responsibility.

The remaining 91 U.S. Attorneys are not listed in the executive pay schedule. As a result, they are not automatically subjected to the nationwide post-employment ban. Instead, pursuant to subparagraph 207(d)(1)(C) and the designation of the Director of Government Ethics, 5 C.F.R. §§ 737.32 & 737.33 (1981), each of the 91 other U.S. Attorneys is subject to less stringent restrictions which prohibit him or her for one year from practicing only before the United States Attorney's office in the specific judicial district in which he or she was employed. Each of these 91 United States Attorneys is free during the one-year period after leaving office to practice before all other United

States Attorneys' offices and before the Department of Justice generally.[1]

Because of the disparity between the treatment of the four United States Attorneys nominally "paid according" to the executive pay schedule and the other 91 United States Attorneys, Thomas P. Sullivan filed suit in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the one year, nationwide ban on his post-government service was an arbitrary and capricious violation of his constitutional rights. Mr. Sullivan's complaint was filed on July 8, 1981. Mr. Sullivan's complaint did not challenge the provisions of the Ethics in Government Act which prohibit him for one year after he left government office from taking an adverse position against his former agency, the United States Attorney's office in the Northern District of Illinois. *See* 18 U.S.C. § 207(a). The complaint, however, did challenge any interpretation of subsections 207(c) and (d) which bans Mr. Sullivan from taking civil or criminal cases against the Department of Justice outside the Northern District of Illinois during that year.[2]

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[1] The four executive level U.S. Attorneys received $2,637.50 per year more in salary than the other 91 U.S. Attorneys. However, the salary provided by statute for the executive level U.S. Attorneys ($61,600) was not paid, because of an Executive Order "pay freeze." (Executive Order 12248, Oct. 16, 1980.) *See* Memorandum Opinion and Order, reprinted as Appendix A to Jurisdictional Statement [hereinafter cited as "J.S."], at 7a-8a.

[2] The district court rejected Mr. Sullivan's two statute-based arguments. Under subparagraph 207(d)(1)(A), officials paid "according to" the executive pay schedule are subject to a one year ban on post-employment contacts with the "department or agency" in

(footnote continued)

The parties submitted cross-motions for summary judgment and briefs on an expedited basis. The Government tendered no affidavits, nor did it request the opportunity to present any evidence. On October 2, 1981, the district court orally announced its ruling that the one year, nationwide employment ban as applied to the four executive level U.S. Attorneys was unconstitutional. The court's written opinion and order was issued January 7, 1982. The Government filed its Notice of Appeal on January 29, 1982. Mr. Sullivan received the Jurisdictional Statement on March 29, 1982.

(footnote continued)

which they were employed. The district court rejected Mr. Sullivan's contention that because of the Presidential pay freezes he was never paid "according to" the executive pay schedule and was therefore not subject to the nationwide ban. J.S., at 7a-8a. The district court also rejected Mr. Sullivan's contention that the U.S. Attorney's Office for the Northern District of Illinois, and not the Department of Justice, was the relevant "department or agency" to which the agency-wide ban on post-employment contacts was applicable. J.S., at 4a-7a.

Should this Court note probable jurisdiction, Mr. Sullivan intends to raise these statutory claims as independent bases for affirming the district court's judgment. *See Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1976); *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 480-81 (1976).

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY DECIDED THAT SECTION 207(d) CREATES AN ARBITRARY AND IRRATIONAL CLASSIFICATION

The district court's ruling relied entirely on well-established precedents of the Court. This controversy presents no novel issues, nor does it require any complex legal analysis. It is a straightforward matter, limited in its applicability to a post-employment restriction placed on four government offices.[3]

A.

The District Court Applied The Appropriate Legal Standard

The Government does not contend that the district court misunderstood or misstated the applicable legal test. As the district court noted, J.S., at 9a, the "Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.' " *Schlesinger* v. *Ballard*, 419 U.S. 498, 500 n.3 (1975), *quoting Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). This Court has stated

[3] The district court properly focused on the dual classification of U.S. Attorneys. Because the four U.S. Attorneys are unique among the executive level positions, the district court's ruling is a narrow one applicable only to these four positions. Although the Government asserts that the district court order would "call into question the classification of other top positions" subject to the employment ban, J.S., at 20, the Government has provided no examples of other positions that would be so affected.

that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). *See also Rostker* v. *Goldberg*, ... U.S. ....., 101 S.Ct. 2646, 2650 n.3 (1981).

It is well-established that statutory classifications which are not rationally related to a legitimate legislative purpose violate equal protection guarantees. In defining the rational basis test, the Court has stated that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415 (1920). The district court properly articulated the rational basis test as the measure for analyzing the constitutionality of the disparate treatment of U.S. Attorneys in subsection 207(d).

B.

The District Court Was Correct In Finding No Rational Relationship Between The Classification And The Legislative Purpose

This Court has not hesitated to find statutes unconstitutional when classifications fail the rational basis test. *See, e.g., Mills* v. *Habluetzel*, No. 80-6298, slip op. (April 5, 1982); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *James* v. *Strange*, 407 U.S. 128 (1972); *Renaldi* v. *Yeager*, 384 U.S. 305 (1966); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *F.S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412 (1920). The district court cor-

rectly applied the rational basis test and this Court's precedents to Mr. Sullivan's equal protection claim.[4]

As the district court observed, the main purpose of the Ethics in Government Act is "to promote efficiency and integrity within the government." J.S., at 10a. Congress sought to prevent former officials from unduly influencing or even appearing to influence their former subordinates still in office. *See* 124 Cong. Rec. 30414-15 (1978). But, as the district court found, J.S., at 12a-13a, a classification which imposes a nationwide, one year employment ban only on four U.S. Attorneys, and not the 91 other U.S. Attorneys, is totally unrelated to the legislative purpose underlying the Ethics in Government Act. The irrationality of the classification is evidenced by its overinclusiveness and underinclusiveness.[5]

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[4] The Government observes that this Court has allowed legislatures to "implement [their] programs step by step . . . ," J.S., at 16, *citing Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 446 (1981), and thus will not overturn an otherwise arbitrary classification that is only one part of a developing regulatory scheme. But because the statutory scheme that Mr. Sullivan challenges was intended to be a single all-encompassing classification, it must independently withstand the rational basis test.

[5] This irrational classification results from inadvertence or inattention, and not from careful consideration of which positions should be subject to the employment ban. Indeed, as evidence of Congress's failure to examine the issue carefully, one need only look to the Congressional decision to base the employment ban on the pay schedules. These schedules serve a purpose entirely distinct from the objective of the Ethics in Government Act. Moreover, rather than a "carefully crafted and balanced effort," J.S., at 11, the legislative history demonstrates Congress's uncertainty and confusion as to the Act's coverage. See 124 Cong. Rec. 30414-15 (1978) (remarks of Reps. Danielson and Wiggins); 125 Cong. Rec. S 7659-60 (daily ed. June 14, 1979). As the Court once noted, "historical accidents . . . do not constitute a compelling state interest." *Illinois Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979). Similarly, with regard to the classification at issue in this case, neither reasonableness or rationality was borne out of accident.

1. *The Classification Created in Section 207(d) is Overinclusive*

The four disadvantaged United States Attorneys have everything in common with the 91 other United States Attorneys covered by subparagraph 207(d)(1)(C), and nothing in common with the other officials covered by subparagraph 207(d)(1)(A), except the specified rate of pay. All United States Attorneys share common duties and powers. The four executive level U.S. Attorneys possess no greater powers than the other ninety-one, and none have any powers or duties outside their districts. *See* 28 U.S.C. § 547. Mr. Sullivan had no influence on any component of the Department of Justice outside the Northern District of Illinois, nor does any other incumbent in the four offices have any influence outside his or her own district.

As observed in the Senate debates, moreover, there is no potential for a former U.S. Attorney to unduly influence or gain unfair advantage over officials in offices other than the U.S. Attorney's office in which he or she once served. Senator Ribicoff noted that the amended version of subparagraph 207(d)(1)(C) "recognizes that former officials sometimes have little influence on a department outside their particular bureau or agency. Thus, in those cases, there is little or no potential for undue influence or unfair advantage over former colleagues or subordinates, who work in different, unrelated bureaus." 125 Cong. Rec. S 7659-60 (daily ed. June 14, 1979). Senator Ribicoff continued, expressing the Congressional intention that subparagraph 207(d)(1)(C), as amended, would permit contact among the various U.S. Attorneys' offices, specifically noting that it would permit contact "between the U.S. Attorney's Office in the eastern district of New York, and the U.S. Attorney's Office for Washington, D.C." 125 Cong. Rec. S 7660 (daily ed. June 14, 1979).[6]

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[6] The United States Attorney in Washington, D.C. is one of the four "executive level" U.S. Attorneys.

Except for the four United States Attorneys, all other executive level positions are national offices at or near the top of their agencys' hierarchy and with nationwide jurisdiction. Whereas the nationwide responsibilities of other positions on the executive pay schedule may justify their inclusion in the nationwide ban on post-employment contacts, such a rationale has no relevance for the four U.S. Attorneys who are without such national duties.[7]

Nonetheless, the Government repeatedly seeks to distinguish the four executive level positions because of their relative rank or stature. *See* J.S., at 12, 13 & 17. As for the ambiguous concept of stature, the Government neither defines it nor explains its relation to the Act's goal of insuring governmental integrity. All 95 U.S. Attorneys are of equal rank; other than $2637.50 per annum in salary, no distinction exists among them. The Government wrongfully attempts to imply a ranking pursuant to the pay schedule in which U.S. Attorneys have been placed. The

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[7] The only "national" responsibility undertaken by a U.S. Attorney during Mr. Sullivan's time in office was the Attorney General's appointment of the U.S. Attorney from the District of Connecticut to head an investigation of leaks from the Abscam and Pendorf investigations.

The only other justification for describing the U.S. Attorney as a "national" office is the consultation on certain pending matters with Justice Department offices which are commonplace for all U.S. Attorneys' offices. Indeed, because of greater experience and resources, the larger U.S. Attorney's offices, including the four executive level offices, frequently have less need for these "national" consultations with the Department offices and may in fact exercise greater independence from the Department than the smaller offices.

differing salary levels among the U.S Attorneys, however, simply reflect their varying workloads.[8]

It is important to note that the Department of Justice itself has concluded that no justification exists for the disparate treatment of the four U.S. Attorneys subject to the nationwide ban. The Department's Office of Legislative Affairs has rejected the notion of relative ranking and the disparate treatment accorded the four executive level U.S. Attorneys by proposing that the four U.S. Attorneys be excluded from the department-wide post-employment ban.[9]

Despite their identical responsibilities and duties, subsection 207(d) creates the anomalous situation in which the former U.S. Attorney for the Eastern District of Wisconsin can travel to Chicago and represent a party in litigation

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[8] Because of the government's pay system an individual officeholder can receive an increase in salary only by being shifted into a higher pay class: from one GS level to another and, for the highest payment positions, into the "executive" pay schedule. These reclassifications for salary purposes, however, do not signify a change in the job's status or duties. In a 1964 letter that initially placed the four United States Attorneys on the executive pay schedule, the Attorney General justified the promotion in salary because of the additional workload of the four offices. *See* J.S., App. C. In 1976 Congress elevated two of the four positions to level IV. Crime Control Act of 1976, Pub. L. No. 94-503, Section 202(b), 90 Stat. 2426. Neither the 1976 bill, its legislative history nor the 1964 letter indictates that the four U.S. Attorney offices are included on the executive pay schedule because of any national prominence or influence or nationwide responsibilities.

[9] The U.S. Attorney's Manual § 10-2.699, footnote 4 (August 21, 1981), states,

> The Department's Office of Legislative Affairs has previously determined that an amendment to the statute would be appropriate in order to eliminate the disparity among U.S. Attorneys. The Executive Office for U.S. Attorneys is urging the Department to submit such an amendment to the Congress.

against the U.S. Attorney's office there, but Mr. Sullivan, who served in Chicago, cannot represent a client in Milwaukee in proceedings with the U.S. Attorney's Office for the Eastern District of Wisconsin. This irrational and incongruous situation is due entirely to the overinclusiveness of subparagraph 207(d)(1)(A).[10]

2. *The Classification Created in Section 207(d) Is Underinclusive.*

The statutory scheme is also underinclusive, because it fails to subject various high-level government officials, who did have nationwide influence and contacts, to the restrictions imposed by subsection 207(c).

For example, many high-ranking positions in the Department of Justice (exclusive of separate bureaus such as the Federal Bureau of Investigation, the Drug Enforcement Administration and the Immigration and Naturalization Service) are not on the executive pay schedule and so do not fall within subparagraph 207(d)(1)(A). Most of these high-ranking Department of Justice positions in Washington, D.C., are designated as "senior employees" under subparagraph 207(d)(1)(C), 5 C.F.R. § 737.33 (1981), and include the Deputy Assistant Attorneys General in the Criminal Division, Tax Division, Antitrust Division, Land and Natural Resources Division, Civil Division, and Civil

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[10] Congress enacted the Ethics in Government Act in 1978. But before its provisions went into effect, Congress determined that the restrictions to be imposed by subsections 207(c) and (d) were "so stringent that many Government employees in key positions felt that they must leave the Government before July 1, 1979, or be barred thereafter from pursuing their own professions and skills after they left Government employ." 125 Cong. Rec. H. 4595, 4596 (daily ed. June 15, 1979). Thus, Congress enacted Pub.L. No. 96-28, 93 Stat. 76 (1979), which amended 18 U.S.C. § 207(d), especially subsection 207(d)(1)(C), in an attempt to remedy the overbroad application of the restrictions imposed by subsection 207(c).

Rights Division. *Id.* These divisions have nationwide responsibility and supervisory control over certain matters handled by U.S. Attorneys. Thus, most criminal tax prosecutions must be approved by the Tax Division; most civil environmental cases must be approved by the Land and Natural Resources Division; a great deal of the civil litigation is subject to review by lawyers in the Civil Division; approval must be obtained from the Criminal Division for the use of certain criminal statutes, such as RICO or the Hobbs Act; and the Civil Rights Division must review and approve most filings in that area of law. *See generally* 28 C.F.R. §§ 0.40-071 (1981).

The deputies in these divisions have constant contact with and supervisory control over the various U.S. Attorneys. Yet, based on the designation made by the Office of Personnel Management under subparagraph 207(d)(1)(C), the deputies in these divisions are free in the one year period after leaving government employ to deal not only with the other divisions at the Department of Justice, but also with the various U.S. Attorneys' offices throughout the country. In contrast, Mr. Sullivan, who had no such extra-district supervisory contacts or control, is prohibited during this one-year period from representing clients before the Department of Justice or any of the ninety-five U.S. Attorneys' offices. This unequal application of the restrictions imposed by subsection 207(d) produces arbitrary and unintended results and is totally irrational.[11]

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[11] The total irrationality of the application of this statute to Mr. Sullivan is even more pronounced when compared with high level government officials in the judicial branch who are much less affected by restrictions on their post-government activities. Section 207 applies only to former employees of the executive branch. Former federal judges are under no disqualification regarding practice within the geographical area in which they served, except for cases that they

(footnote continued)

II.

THIS CASE REMAINS A JUSTICIABLE CONTROVERSY AND THEREFORE IS NOT MOOT

Although Thomas Sullivan's one year post-employment restriction expires on April 30, 1982, this case will remain a justiciable controversy thereafter. Contrary to the Government's suggestion, J.S., at 21, this case will not become moot after that date.

This controversy is "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911). The one year, nationwide employment ban does now restrict two other former U.S. Attorneys who have left office within the last year (Charles F.C. Ruff, former U.S. Attorney for Washington, D.C. and Andrea S. Ordin, former U.S. Attorney for the Central District of California), and will continue to restrict other former U.S. Attorneys in the four affected districts as their commissions expire. Because this nationwide employment ban lasts one year, however, this controversy may never be adjudicated by the Court before it expires with respect to any given plaintiff. It would be unseemly for one presently serving as U.S. Attorney to bring this action, and a class action would probably fail for lack of "numerosity." *See Fed.R.Civ.P.* 23(a)(1). This controversy may therefore never be resolved unless accepted in its present form.

(footnote continued)

themselves were involved in as judges. ABA, Code of Professional Responsibility, Canon 9, EC 9-3 (1978). The only statutory restriction on the activities of judges, 28 U.S.C. § 454, simply prohibits them from practicing law while serving as a member of the judiciary. After leaving the bench, however, federal judges may represent persons before other federal judges, including judges in the very district or circuit in which they formerly sat.

In *Storer* v. *Brown*, 415 U.S. 724 (1973), an independent candidate for political office challenged a state's candidacy petition laws. Although the election was "long over" and no "effective relief" could be provided, the Court ruled that the case was not moot. "The issues [were] properly presented, [but] their effects on independent candidacies will persist as the . . . statutes are applied in the future elections." 415 U.S. at 737 n.8. Similarly, in this case, the issues have been properly presented and as long as the one year ban is enforced it will continue to restrict other former U.S. Attorneys and will affect the futures of those who may seek appointment to those offices. *See also Roe* v. *Wade*, 410 U.S. 113, 124-25 (1973) (although the pregnancy had been terminated, challenge of abortion law was not moot); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972) (challenge to state residency requirement for voting was not moot after election); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969) (challenge of candidacy petition law was not moot after election).[12]

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[12] In addition, Mr. Sullivan's complaint requested relief in the form of a declaratory judgment. The Court has previously observed that requests for such relief can be instrumental in maintaining the existence of a controversy. In *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969), the appellant challenged laws regulating candidacy petitions, but the Court found the controversy moot. The Court distinguished *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), wherein a very similar law was reviewed after the election. Unlike the declaratory relief requested in *Moore* v. *Ogilvie*, the *Brockington* appellant had sought a writ of mandamus. But the *Brockington* case was ruled moot, because the Court found it "impossible" after the election to grant the limited extraordinary relief sought by the appellant. 396 U.S. at 44. Presumably, the Court reasoned that under a petition for mandamus the only relief available is an order to the election commissioner to place the appellant's name on the ballot, but because the election was over, the Court could not issue the requested order.

Even if this Court should decide that this case is moot, the district court judgment should be left intact. When a case is declared moot, the Court frequently vacates the judgment below and remands the case to the district court with instructions to dismiss. *Board of Regents* v. *New Left Education Project,* 414 U.S. 807 (1973) (per curiam); *United States* v. *Munsingwear,* 340 U.S. 36, 39 n.2 (1950). This Court, however, is not bound by such rules on the disposition of moot appeals. *See, e.g., Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412, 415 (1972) (per curiam) (order to vacate with leave to amend pleadings); *Bryan* v. *Austin,* 354 U.S. 933 (1957) (per curiam) (same); *United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950) (lower court decision affirmed); *Royal Cadillac Service, Inc.* v. *United States,* 317 U.S. 595, 596 (1942) (per curiam) (lower court order affirmed).

As stated in *Munsingwear,* the reason for eliminating the precedential effect of moot cases is to allow relitigation of the issues where review was prevented by "happenstance." 340 U.S. at 40. In the controversy before this Court, however, if the issue is considered moot it results not from happenstance, but from the short duration of the controversy and the Government's delay in appealing the matter to this Court. Although the district court issued its oral ruling on October 2, 1981, the Government did not press the court for a written order and did not seek a stay of the district court's judgment. Nor did the Government seek expedited review in this Court. In addition, in filing both its notice of appeal and its jurisdictional statement, the Government permitted a significant amount of time to elapse.[13] Therefore, as a matter of fairness,

[13] The appellants did not file their notice of appeal until January 29, 1982. The appellants allowed 22 of the 30 allotted days to pass before filing their notice of appeal. The appellants then took the entire 60 day period in which to file their Jurisdictional Statement.

should this Court find the controversy to be moot, Mr. Sullivan requests that this Court enter an order dismissing the Government's appeal. *See, e.g., Schenley Distilling Corp.* v. *Anderson*, 333 U.S. 878 (1948) (per curiam) (appeal dismissed as moot); *Pan American Airways Corp.* v. *Grace & Co.*, 332 U.S. 827 (1947) (per curiam) (writ of certiorari dismissed as moot). It is requested that the Court not issue an order vacating the district court's judgment or instructing the district court to vacate its judgment order.

Respectfully submitted,

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